

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEROME MARKIEL DAVIS,

Petitioner,

v.

B. CATES,

Respondent.

No. 2:21-CV-01900-KJM-DMC-P

ORDER

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner also brings a motion for new trial. The matters were referred to a United States Magistrate Judge as provided by Eastern District of California local rules.

On September 12, 2022, the magistrate judge filed findings and recommendations, which were served on the parties and which contained notice that the parties may file objections within the time specified therein. No objections to the findings and recommendations have been filed.

The court presumes that any findings of fact are correct. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. *See Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007) (“[D]eterminations of law by the magistrate judge are reviewed de novo by both the district court and [the appellate] court . . .”). Having reviewed the file, the court finds the findings and recommendations to be supported by

1 the record and by the proper analysis. As the magistrate judge found, “[w]hile juries must receive
2 instruction on lesser included offenses in capital cases . . . the failure of a state trial court to
3 instruct sua sponte on lesser included offenses in a non-capital case does not present a federal
4 constitutional question.” *Burgess v. Galaza*, 211 F.3d 1272 (9th Cir. 2000) (internal citations,
5 marks and emphasis omitted).

6 The court has also considered whether to issue a certificate of appealability under Rule
7 11(a) of the Federal Rules Governing Section 2254 Cases. Before petitioner can appeal this
8 decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).
9 Where the petition is denied on the merits, a certificate of appealability may issue under
10 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
11 constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
12 appealability indicating which issues satisfy the required showing or must state the reasons why
13 such a certificate should not issue. *See* Fed. R. App. P. 22(b). Where the petition is dismissed on
14 procedural grounds, a certificate of appealability should issue if the prisoner can show “jurists of
15 reason would find it debatable whether the petition states a valid claim of the denial of a
16 constitutional right and that jurists of reason would find it debatable whether the district court was
17 correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons
18 set forth in the magistrate judge’s findings and recommendations, the court finds that issuance of
19 a certificate of appealability is not warranted in this case.

20 Accordingly, IT IS HEREBY ORDERED:

- 21 1. The findings and recommendations filed September 12, 2022, are adopted in full;
- 22 2. Petitioner’s first amended petition for a writ of habeas corpus, ECF No. 10, is
23 denied;
- 24 3. The court declines to issue a certificate of appealability;
- 25 4. Petitioner’s motion, ECF No. 18, for a new trial is denied; and
- 26 5. The Clerk of the Court is directed to enter judgment and close this file.

27 DATED: January 24, 2023.

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CHIEF UNITED STATES DISTRICT JUDGE